Supreme Court, U.S.
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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE U.S. POULTRY & EGG ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
ARGUMENT	3
I. THE LACK OF PROPER LIMITING PRINCIPLES ON THE CERTIFICATION OF COLLECTIVE ACTIONS UNDER THE FLSA HAS CAUSED A FLOOD OF LITIGATION THAT IS LIKELY TO CONTINUE	3
II. DISTRICT COURTS FREQUENTLY ADDRESS WHETHER DATA AND TESTIMONY FROM A SAMPLE OF EMPLOYEES CAN BE EXTRAPOLATED TO DETERMINE LIABILITY AND DAMAGES IN WAGE AND HOUR CLASS CASES	12
III. THE EIGHTH CIRCUIT MISCONSTRUED *MT. CLEMENS* AND SHOULD HAVE DECERTIFIED THE CLASS	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page(s)

Abadeer v. Tyson Foods, Inc.,
No. 3:09-00125, 2009 U.S. Dist.
LEXIS 110685 (M.D. Tenn. Nov. 25, 2009) ... 7

Acosta v. Tyson Foods, Inc.,
No. 8:08CV86, 2011 U.S. Dist.
LEXIS 35152 (Mar. 30, 2011) 6

Aguilar v. Pilgrim's Pride Corp.,
No. CV-06-J-1673-NE, 2007 U.S. Dist.
LEXIS 29168 (N.D. Ala. Jan. 31, 2007)..... 8

Albritton v. Cagles, Inc.,
No. 1:05-CV-74 (WLS), 2006 U.S. Dist.
LEXIS 65027 (N.D. Ga. Sept. 11, 2006) 8

Allen v. McWane, Inc.,
No. 2:06-CV-158 (TJW), 2006 U.S. Dist.
LEXIS 81543 (E.D. Tex. Nov. 7, 2006) 8

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) .....*passim*

Andrako v. U.S. Steel Corp.,
No. 07-1629, 2009 U.S. Dist.
LEXIS 78788 (W.D. Pa. Sept. 2, 2009) 7

Armstrong v. Martin Marietta Corp.,
138 F.3d 1374 (11th Cir. 1998) 10

Barbosa v. Nat'l Beef Packing Co.,
No. 12-2311-KHV, 2013 U.S. Dist.
LEXIS 12815 (D. Kan. Jan. 31, 2013) 6

Baricuatro v. Industrial Personnel &
Management Servs., Inc.,
No. 11-2777, 2012 U.S. Dist.
LEXIS 161097 (E.D. La. Nov. 9, 2012)..... 6

TABLE OF AUTHORITIES—Continued

Page(s)

Benbow v. Gold Kist, Inc.,
No. 3:06-cv-02751-MBS, 2007 U.S. Dist.
LEXIS 102273 (D.S.C. Apr. 16, 2007)..... 8, 9

Bobryk v. Durand Glass Manufacturing Co.,
No. 12-5360(NLH)(JS), 2014 U.S. Dist.
LEXIS 137168 (D.N.J. Sept. 29, 2014) 5-6

Bowman v. Doe Run Resources Corp.,
No. 4:13 CV 2519 CDP, 2014 U.S. Dist.
LEXIS 98333 (E.D. Mo. July 21, 2014)..... 6

Braun v. Superior Industries Int'l, Inc.,
No. 09-2560-JWL, 2010 U.S. Dist.
LEXIS 102863 (D. Kan. Sept. 28, 2010) 7

Brooks v. Safety-Kleen Systems, Inc.,
No. 11 C 7245, 2012 U.S. Dist.
LEXIS 117035 (N.D. Ill. Aug. 14, 2012) 6

Busler v. Energys Energy Products, Inc.,
No. 09-00159-CV-W-FJG, 2009 U.S. Dist.
LEXIS 84500 (W.D. Mo. Sept. 16, 2009) 7

Carlson v. Leprino Foods Co.,
No. 1:05-CV-798, 2006 U.S. Dist.
LEXIS 48589 (W.D. Mich. June 30, 2006).... 8

Centurioni v. City & County of San Francisco,
No. C 07-01016 JSW, 2008 U.S. Dist.
LEXIS 10856 (N.D. Cal. Feb. 1, 2008)..... 8

Childress v. Ozark Delivery of Missouri, LLC,
No. 6:09-cv-03133-MDH, 2014 U.S. Dist.
LEXIS 173309 (W.D. Mo. Dec. 16, 2014)..... 14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

Conerly v. Marshall Durbin Co.,
No. 2:06cv205KS-MTP, 2007 U.S. Dist.
LEXIS 85994 (S.D. Miss. Nov. 6, 2007)..... 8

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 10

Cortez v. Nebraska Beef, Inc.,
No. 8:08CV90, 2008 U.S. Dist.
LEXIS 95562 (D. Neb. Nov. 21, 2008) 7

Curry v. Kraft Foods Global, Inc.,
No. 10 C 1288, 2011 U.S. Dist.
LEXIS 102510 (N.D. Ill. Sept. 12, 2011) 6

Daniel v. Quail Int'l, Inc.,
No. 3:07-CV-053 (CDL), 2008 U.S. Dist.
LEXIS 61013 (M.D. Ga. Aug. 11, 2008)..... 7

Dege v. Hutchinson Technology, Inc.,
No. 06-3754 (DWF/RLE), 2007 U.S. Dist.
LEXIS 12471 (D. Minn. Feb. 22, 2007)..... 8

DeKeyser v. Thyssenkrupp Waupaca Foundry, Inc.,
No. 08-C-488, 2008 U.S. Dist.
LEXIS 102318 (E.D. Wis. Dec. 18, 2008)..... 7

Dominquez v. Minn. Beef Industries, Inc.,
No. 06-1002 (RHK/AJB), 2007 U.S. Dist.
LEXIS 61298 (D. Minn. Aug. 21, 2007)..... 8

Espenscheid v. DirectSat USA, LLC,
705 F.3d 770 (7th Cir. 2013) 10, 12

Farmer v. DirectSat USA, LLC,
No. 08 CV 3962, 2013 U.S. Dist.
LEXIS 79825 (N.D. Ill. June 6, 2013)..... 13

TABLE OF AUTHORITIES—Continued

Page(s)

Ford v. Townsends of Ark., Inc., No. 4:08cv00509 BSM, 2010 U.S. Dist. LEXIS 46093 (E.D. Ark. Apr. 9, 2010) 7

Frank v. Gold'n Plump Poultry, Inc., No. 04-CV-1018 (PJS/RLE), 2007 U.S. Dist. LEXIS 71179 (D. Minn. Sept. 24, 2007) 8

Fujiwara v. Sushi Yasuda Ltd., No. 12cv8742, 2014 U.S. Dist. LEXIS 159140 (S.D.N.Y. Nov. 12, 2014) 3

Garcia v. Tyson Foods, Inc., 255 F.R.D. 678 (D. Kan. Feb. 12, 2009)..... 7

Garcia v. Tyson Foods, Inc., No. 06-2198-JTM, 2012 U.S. Dist. LEXIS 170177 (D. Kan. Nov. 29, 2012)..... 11

Garner v. Butterball, LLC, No. 4:10CV01025 JLH, 2012 U.S. Dist. LEXIS 21859 (E.D. Ark. Feb. 22, 2012)..... 6

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) 2

Gil v. Solectron Corp., No. C-07-06414 RMW, 2009 U.S. Dist. LEXIS 3413 (N.D. Cal. Jan. 9, 2009)..... 7, 8

Gomez v. Tyson Foods, Inc., No. 8:08CV21, 2011 U.S. Dist. LEXIS 34623 (D. Neb. Mar. 30, 2011)..... 6

Harris v. Smithfield Packing Co., No. 4:09-CV-41-H(1), 2011 U.S. Dist. LEXIS 108976 (E.D.N.C. Sept. 23, 2011) 6

TABLE OF AUTHORITIES—Continued

Page(s)

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Harvey v. AB Electrolux, 857 F Supp. 2d 815 (N.D. Iowa 2012) 6

Helmert v. Butterball, LLC, No. 4:08CV00342 JLH, 2009 U.S. Dist. LEXIS 116460 (E.D. Ark. Dec. 15, 2009) 7

Horne v. Smithfield Packing Co., No. 5:09-CV-42-H(1), 2011 U.S. Dist. LEXIS 108978 (E.D.N.C. Sept. 23, 2011) 6

Hosler v. Smithfield Packing Co., No. 7:07-CV-166-H, 2010 U.S. Dist. LEXIS 101912 (E.D.N.C. Sept. 27, 2010) 7

Howard v. Securitas Sec. Servs. USA, Inc., No. 08 C 2746, 09 C 3633, 2013 U.S. Dist. LEXIS 44912 (N.D. Ill. Mar. 28, 2013) 13-14

IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) 5

In re Bank of Am. Wage & Hour Litig., No. 10-MD-2138-JWL, 2013 U.S. Dist. LEXIS 180056 (D. Kan. Dec. 18, 2013) 11

In re Pilgrim's Pride F.L.S.A. Litigation, MDL Docket No. 1:07-cv-1832, 2008 U.S. Dist. LEXIS 93966 (W.D. Ark. Mar. 13, 2008) 8, 9

In re Tyson Foods, Inc., Fair Labor Standards Act Litigation, 694 F. Supp. 2d 1372 (M.D. Ga. 2010) 6, 8-9

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Page(s)

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768 F.3d 1245 (10th Cir. 2014) 12

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No. 10-6046-CV-SJ-FJG, 2012 U.S. Dist.
LEXIS 24021 (W.D. Mo. Feb. 9, 2012)..... 6

Johnson v. Koch Foods, Inc.,
657 F. Supp. 2d 951 (E.D. Tenn. 2009)..... 7

Johnson v. Wave Comm GR LLC,
4 F. Supp. 3d 453 (N.D.N.Y. 2014) 12

Kasten v. Saint-Gobain Performance Plastics Corp.,
556 F. Supp. 2d 941 (W.D. Wis. 2008)..... 7

King v. Koch Foods of Miss.,
No. 3:06CV301TSL-JCS, 2007 U.S. Dist.
LEXIS 26746 (S.D. Miss. Apr. 10, 2007) 8

Knaak v. Armour-Eckrich Meats LLC,
991 F. Supp. 2d 1052 (D. Minn. 2014)..... 5

Lopez v. Sam Kane Beef Processors, Inc.,
No. CC-07-335, 2008 U.S. Dist.
LEXIS 15572 (S.D. Tex. Feb. 29, 2008)..... 8

Lopez v. Tyson Foods,
No. 8:06CV459, 2008 U.S. Dist.
LEXIS 60050 (D. Neb. Aug. 7, 2008) 7

Lugo v. Farmer's Pride Inc.,
737 F. Supp. 2d 291 (E.D. Pa. 2010)..... 14, 15

Lugo v. Farmer's Pride Inc.,
No. 07-cv-00749, 2008 U.S. Dist.
LEXIS 17565 (E.D. Pa. Mar. 7, 2008)..... 8

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Page(s)

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No. 10-cv-0011-MJR-CJP, 2010 U.S. Dist.
LEXIS 59549 (S.D. Ill. June 16, 2010) 7

Martinez v. Cargill Meat Solutions,
265 F.R.D. 490 (D. Neb. Dec. 11, 2009) 7

Martinez-Hernandez v. Butterball, LLC,
No. 5:07-174-H(2), 2008 U.S. Dist.
LEXIS 111931 (E.D.N.C. Nov. 14, 2008) 7

McLaurin v. Prestage Foods,
271 F.R.D. 465 (E.D.N.C. 2010) 6

Melgar v. O.K. Foods, Inc.,
No. 2:13-CV2169-RTD, 2015 U.S. Dist.
LEXIS 41807 (W.D. Ark. Mar. 31, 2015) 5

Mims v. Carrier Corp.,
No. 2:06-CV-206, 2007 U.S. Dist.
LEXIS 102270 (E.D. Tex. Sept. 11, 2007) ... 8

Mitchell v. Smithfield Packing Co.,
No. 4:08-CV-182-H(1), 2011 U.S. Dist.
LEXIS 108974 (E.D.N.C. Sept. 23, 2011) 6

Morales v. Farmland Foods, Inc.,
No. 8:08cv504, 2012 U.S. Dist.
LEXIS 7586 (D. Neb. Jan. 24, 2012) 6

Morales v. Farmland Foods, Inc.,
No. 8:08CV504, 2013 U.S. Dist.
LEXIS 56501 (D. Neb. Apr. 18, 2013) 11

Morales v. Greater Omaha Packing Co.,
266 F.R.D. 294 (D. Neb. 2010) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Morris v. Alle Processing Corp.,
No. 08-CV-4874 (JMA), 2013 U.S. Dist.
LEXIS 64534 (E.D.N.Y. May 6, 2013) 6

Musch v. Domtar Industries, Inc.,
252 F.R.D. 456 (W.D. Wis. 2008) 7

Musticchi v. Little Rock,
No. 4:08cv00419 SWW, 2009 U.S. Dist.
LEXIS 120549 (E.D. Ark. Feb. 2, 2009)..... 7

O'Brien v. Ed Donnelly Enter., Inc.,
575 F.3d 567 (6th Cir. 2009) 20

Olson v. Tesoro Refining & Marketing Co.,
No. C06-1311RSL, 2007 U.S. Dist.
LEXIS 67747 (W.D. Wash. Sept. 12, 2007).... 8

Owens v. Southern Hens, Inc.,
No. 2:07cv28-KS-MTP, 2008 U.S. Dist.
LEXIS 34817 (S.D. Miss. Mar. 17, 2008)..... 7-8

Parker v. Smithfield Packing Co.,
No. 7:07-CV-176-H, 2010 U.S. Dist.
LEXIS 101191 (E.D.N.C. Sept. 27, 2010).... 7

Perez v Mountaire Farms,
601 F. Supp. 2d 670 (D. Md. 2009) 7

Phelps v. Parsons Tech. Support, Inc.,
No. 2:09-0327-JMS-WGH, 2010 U.S. Dist.
LEXIS 116166 (S.D. Ind. Oct. 29, 2010)..... 6-7

Reed v. County of Orange,
266 F.R.D. 446 (C.D. Cal. Jan. 8, 2010)..... 7

Robinson v. Tyson Foods, Inc.,
254 F.R.D. 97S.D. Iowa 2008)..... 7

TABLE OF AUTHORITIES—Continued

Page(s)

Roble v. Celestica Corp.,
627 F. Supp. 2d 1008 (D. Minn. 2007) 8

Romero v. Mountaire Farms, Inc.,
796 F. Supp. 2d 700 (E.D.N.C. 2011) 6

Sanchez v. Creekstone Farms Premium Beef, LLC,
No. 11-4037-EFM-KGG, 2012 U.S. Dist. LEXIS 13458 (D. Kan. Feb. 6, 2012) 6

Smith v. Safety-Kleen Systems, Inc.,
No. 10 C 6574, 2011 U.S. Dist. LEXIS 40670 (N.D. Ill. Apr. 14, 2011) 6

Spoerle v. Kraft Foods Global, Inc.,
253 F.R.D. 434 (W.D. Wis. 2008) 7

Stiller v. Costco Wholesale Corp.,
298 F.R.D. 611 (S.D. Cal. 2014) .....*passim*

Swint v. Chambers Cnty Comm'm,
514 U.S. 35 (1995) 9

Thompson v. Bruister & Assoc.,
No. 3:07-00412, 2013 U.S. Dist. LEXIS 139374 (M.D. Tenn. Sept. 27, 2013)... 13

Vogt v. Texas Instruments, Inc.,
No. 3:05-CV-2244-L, 2006 U.S. Dist. LEXIS 67226 (N.D. Tex. Sept. 19, 2006) 8

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (U.S. 2011) 19

Wilson v. Navika Capital Group, LLC,
No. 4:10-CV-1569, 2014 U.S. Dist. LEXIS 7181 (S.D. Tex. Jan. 17, 2014) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Wren v. RGIS Inventory Specialists, No. C-06-05778 JCS, 2007 U.S. Dist. LEXIS 95439 (N.D. Cal. Dec. 19, 2007)..... 8

STATUTES

28 U.S.C. § 1292..... 9

28 U.S.C. § 1292(b) 10

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29 U.S.C. § 216(b)..... 2, 9, 21

RULES

Fed. R. Civ. P. 23..... 2, 15, 18, 21

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TABLE OF AUTHORITIES—Continued

Page(s)

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The U.S. Poultry & Egg Association respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by Tyson Foods, Inc. ("Tyson").

INTEREST OF THE *AMICUS CURIAE* [1]

The U.S. Poultry & Egg Association ("USPOULTRY") is a non-profit trade association representing the interests of more than 30,000 producers who own and operate farms and other facilities that produce, process, and/or distribute poultry and eggs for domestic and world markets. USPOULTRY has numerous members who own and operate processing plants similar to the pork-processing plant that is the subject of this case. Dozens of USPOULTRY's members have recently been targets of class claims that are very similar to those in the present case and have included claims that the member violated the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, as amended, and state wage and hour laws by allegedly failing to pay employees for time spent donning and doffing sanitary and protective clothing and walking to and from their work stations. USPOULTRY's members face substantial and uncertain litigation burdens arising from the lack of clarity and appropriate limiting principles in class and collective action litigation. Thus, USPOULTRY has a direct and ongoing interest in the issues presented in this case regarding the standards used to certify

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[1] Pursuant to Supreme Court Rule 37.6, USPOULTRY represents that this brief was not authored in whole or in part by any party or their counsel and that USPOULTRY timely provided notice of its intent to file this brief to all parties. No person other than USPOULTRY, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Court.

class actions under Rule 23 of the Federal Rules of Civil Procedure and collective actions under the FLSA. Indeed, ensuring that federal courts properly apply relevant class and collective action certification[2] procedures is one of the most pressing and important concerns facing USPOULTRY's members.

USPOULTRY seeks to assist the Court by highlighting the importance of the issues presented beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention the large number of similar cases with similar issues in recent years, including cases where class or collective actions were improperly certified. Such decisions are rarely reviewed by appellate courts, and many of USPOULTRY's members feel economic pressure to settle, regardless of the underlying merits of the case, after losing the certification battle. Because of the experience of its members with respect to the matters at issue, USPOULTRY is well situated to brief the Court on the significance of the issues raised by Tyson and the need for guidance from this Court.

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[2] This Court recently noted that lower courts have borrowed class-action terminology by describing the process of joining co-plaintiffs under § 216(b) as "conditional certification" of a collective action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 n.1 (2013). Because courts continue to use the terms "certification" and "conditional certification" of a collective action, USPOULTRY does so in this brief.

ARGUMENT

I. THE LACK OF PROPER LIMITING PRINCIPLES ON THE CERTIFICATION OF COLLECTIVE ACTIONS UNDER THE FLSA HAS CAUSED A FLOOD OF LITIGATION THAT IS LIKELY TO CONTINUE.

In recent years, there has been a staggering increase in the number of FLSA cases and the number of FLSA collective actions filed in federal courts. *See* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U.L. Rev. 960, 1024 n.135 (Oct. 2012) ("Widespread resort to the FLSA collective action by litigants, however, is a relatively recent development, with the number of such actions increasing markedly since the 1990s."); *Fujiwara v. Sushi Yasuda Ltd.*, No. 12cv8742, 2014 U.S. Dist. LEXIS 159140, at *1 (S.D.N.Y. Nov. 12, 2014) (explaining that "[r]ecent years have witnessed an explosion in FLSA litigation" and that "FLSA cases constitute nearly 9% of the civil cases filed" in the Southern District of New York in 2014). Many of these cases, like the present case, involve parallel state law claims. (*See* pp. 5-8, *infra*.) In 1991, FLSA lawsuits constituted 0.6 percent of all civil lawsuits. *See* United States Government Accountability Office, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing its Guidance* 6 (2013).[3] By 2012, "FLSA lawsuits accounted for almost 3 percent of all civil lawsuits, an increase of 383 percent." *Id.* Between 2001 and 2013 alone, the number of FLSA cases filed in federal court increased from 1,854 to 7,764, an increase of over 400 percent. *See* Administrative Office of the United

[3] Available at http://www.gao.gov/assets/660/659772.pdf

States Courts, *Judicial Business of the United States Courts: 2001 Report of the Director*, Table C-2 at 46;[4] Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2014 Report of the Director*, Table C-2.[5] In 2014, the total number of FLSA lawsuits filed increased again, topping 8,000. *See Annual Workplace Class Action Litigation Report*, Seyfarth Shaw LLP, at 5 (2015 ed.).[6]

At the heart of this explosion of FLSA cases in recent years has been the rise in collective actions. Between 1997 and 2010, the number of FLSA collective actions filed in federal courts increased from just 31 to at least 1,967. *See* Daunta Bembenista Panich & Christopher C. Murray, *Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act*, Fed. Lawyer, Mar/Apr. 2011, at 14. In 2010, according to one study, 90 percent of state and federal class or collective actions filed in the United States were wage and hour claims. Laurent Badoux, ADP, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take* 1 (2012).[7] In 2014, virtually all FLSA lawsuits were filed as collective actions.

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[4] Available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2001.aspx

[5] Available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx.

[6] Available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC0QFjAC&url=http%3A%2F%2Fwww.workplaceclassaction.com%2Ffiles%2F2015%2F01%2FWCAR-Intro2.pdf&ei=x6UuVezLLLHfsAT_1IDwDQ&usg=AFQjCNGzCbUP4j0USGMvTYJfHz6WyEZRPA

[7] Available at http://www.lb7.uscourts.gov/documents/12-19431.pdf.

See Annual Workplace Class Action Litigation Report, Seyfarth Shaw LLP, at 5 (2015 ed.).

One noted cause of this flood in FLSA collective action litigation is the relative ease to certification of a class because of a lack of limiting principles in this area: "Employees can obtain certification of FLSA 'class' actions with relative ease compared to employment discrimination class actions, and this ease of access has naturally drawn the attention of the plaintiffs' bar." *See* Panich & Murray, *supra*, at 14. In 2014, for example, plaintiffs in FLSA collective actions won roughly 70 percent of conditional certification motions and succeeded in about 52 percent of subsequent decertification bids by employers. *See Annual Workplace Class Action Litigation Report*, Seyfarth Shaw LLP, at 7 (2015 ed.).

USPOULTRY conducted its own search of recent wage and hour cases, focusing specifically on claims alleging failure to pay for time spent donning and doffing in the aftermath of this Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), which held that the time employees at a meat processing plant spent walking to and from their work stations is compensable in addition to the time spent donning and doffing protective clothing. Searching only decisions reported on www.lexis.com after the Court's decision in *Alvarez*, there have been over seventy (70) collective actions or class actions certified (conditionally or otherwise) in federal district courts based on claims for failure to adequately compensate class members for time spent donning and doffing items.[8]

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[8] *See, e.g., Melgar v. O.K. Foods, Inc.*, No. 2:13-CV2169-RTD, 2015 U.S. Dist. LEXIS 41807, at *8 (W.D. Ark. Mar. 31, 2015); *Knaak v. Armour-Eckrich Meats LLC*, 991 F. Supp. 2d 1052, 1060-61 (D. Minn. 2014); *Bobryk v. Durand Glass Manufacturing*

Co., No. 12-5360(NLH)(JS), 2014 U.S. Dist. LEXIS 137168, at *21 (D.N.J. Sept. 29, 2014); *Bowman v. Doe Run Resources Corp.*, No. 4:13 CV 2519 CDP, 2014 U.S. Dist. LEXIS 98333, at *19-*20 (E.D. Mo. July 21, 2014); *Hart v. Sandridge Energy, Inc.*, No. CIV-14-178-R, 2014 U.S. Dist. LEXIS 89314, at *10 (W.D. Okl. July 1, 2014); *Morris v. Alle Processing Corp.*, No. 08-CV-4874 (JMA), 2013 U.S. Dist. LEXIS 64534, at *43 (E.D.N.Y. May 6, 2013); *Barbosa v. Nat'l Beef Packing Co.*, No. 12-2311-KHV, 2013 U.S. Dist. LEXIS 12815, at *17 (D. Kan. Jan. 31, 2013); *Harvey v. AB Electrolux*, 857 F. Supp. 2d 815, 819-20 (N.D. Iowa 2012); *Baricuatro v. Industrial Personnel & Management Servs., Inc.*, No. 11-2777, 2012 U.S. Dist. LEXIS 161097, at *12 (E.D. La. Nov. 9, 2012); *Brooks v. Safety-Kleen Systems, Inc.*, No. 11 C 7245, 2012 U.S. Dist. LEXIS 117035, at *17 (N.D. Ill. Aug. 14, 2012); *Garner v. Butterball, LLC*, No. 4:10CV01025 JLH, 2012 U.S. Dist. LEXIS 21859, at *27 (E.D. Ark. Feb. 22, 2012); *Ingersoll v. Farmland Foods, Inc.*, No. 10-6046-CV-SJ-FJG, 2012 U.S. Dist. LEXIS 24021, at *40 (W.D. Mo. Feb. 9, 2012); *Sanchez v. Creekstone Farms Premium Beef, LLC*, No. 11-4037-EFM-KGG, 2012 U.S. Dist. LEXIS 13458, at *11 (D. Kan. Feb. 6, 2012); *Morales v. Farmland Foods, Inc.*, No. 8:08cv504, 2012 U.S. Dist. LEXIS 7586, at *3-*4 (D. Neb. Jan. 24, 2012); *Romero v. Mountaire Farms, Inc.*, 796 F. Supp. 2d 700, 717 (E.D.N.C. 2011); *Harris v. Smithfield Packing Co.*, No. 4:09-CV-41-H(1), 2011 U.S. Dist. LEXIS 108976, at *11-*12 (E.D.N.C. Sept. 23, 2011); *Horne v. Smithfield Packing Co.*, No. 5:09-CV-42-H(1), 2011 U.S. Dist. LEXIS 108978, at *11 (E.D.N.C. Sept. 23, 2011); *Mitchell v. Smithfield Packing Co.*, No. 4:08-CV-182-H(1), 2011 U.S. Dist. LEXIS 108974, at *10-*11 (E.D.N.C. Sept. 23, 2011); *Curry v. Kraft Foods Global, Inc.*, No. 10 C 1288, 2011 U.S. Dist. LEXIS 102510, at *23-*24 (N.D. Ill. Sept. 12, 2011); *Smith v. Safety-Kleen Systems, Inc.*, No. 10 C 6574, 2011 U.S. Dist. LEXIS 40670, at *13-*14 (N.D. Ill. Apr. 14, 2011); *Acosta v. Tyson Foods, Inc.*, No. 8:08CV86, 2011 U.S. Dist. LEXIS 35152, at *3 (Mar. 30, 2011); *Gomez v. Tyson Foods, Inc.*, No. 8:08CV21, 2011 U.S. Dist. LEXIS 34623, at *3 (D. Neb. Mar. 30, 2011); *In re Tyson Foods, Inc., Fair Labor Standards Act Litigation*, 694 F. Supp. 2d 1372, 1380 (M.D. Ga. 2010); *McLaurin v. Prestage Foods*, 271 F.R.D. 465, 479 (E.D.N.C. 2010); *Morales v. Greater Omaha Packing Co.*, 266 F.R.D. 294, 297 (D. Neb. 2010); *Phelps v. Parsons Tech. Support, Inc.*, No. 2:09-0327-JMS-WGH, 2010 U.S. Dist. LEXIS

116166, at *18-*19 (S.D. Ind. Oct. 29, 2010); *Braun v. Superior Industries Int'l, Inc.*, No. 09-2560-JWL, 2010 U.S. Dist. LEXIS 102863, at *17 (D. Kan. Sept. 28, 2010); *Hosler v. Smithfield Packing Co.*, No. 7:07-CV-166-H, 2010 U.S. Dist. LEXIS 101912, at *4-*5 (E.D.N.C. Sept. 27, 2010); *Parker v. Smithfield Packing Co.*, No. 7:07-CV-176-H, 2010 U.S. Dist. LEXIS 101191, at *3 (E.D.N.C. Sept. 27, 2010); *Marshall v. Amsted Industries, Inc.*, No. 10-cv-0011-MJR-CJP, 2010 U.S. Dist. LEXIS 59549, at *19 (S.D. Ill. June 16, 2010); *Ford v. Townsends of Ark., Inc.*, No. 4:08cv00509 BSM, 2010 U.S. Dist. LEXIS 46093, at *26 (E.D. Ark. Apr. 9, 2010); *Reed v. County of Orange*, 266 F.R.D. 446, 463-64 (C.D. Cal. Jan. 8, 2010); *Johnson v. Koch Foods, Inc.*, 657 F. Supp. 2d 951, 953 (E.D. Tenn. 2009); *Perez v Mountaire Farms*, 601 F. Supp. 2d 670, 684 (D. Md. 2009); *Helmert v. Butterball, LLC*, No. 4:08CV00342 JLH, 2009 U.S. Dist. LEXIS 116460, at *59 (E.D. Ark. Dec. 15, 2009); *Martinez v. Cargill Meat Solutions*, 265 F.R.D. 490, 501 (D. Neb. Dec. 11, 2009); *Abadeer v. Tyson Foods, Inc.*, No. 3:09-00125, 2009 U.S. Dist. LEXIS 110685, at *39 (M.D. Tenn. Nov. 25, 2009); *Busler v. Energys Energy Products, Inc.*, No. 09-00159-CV-W-FJG, 2009 U.S. Dist. LEXIS 84500, at *13-*14 (W.D. Mo. Sept. 16, 2009); *Andrako v. U.S. Steel Corp.*, No. 07-1629, 2009 U.S. Dist. LEXIS 78788, at *16 (W.D. Pa. Sept. 2, 2009); *Garcia v. Tyson Foods, Inc.*, 255 F.R.D. 678, 693 (D. Kan. Feb. 12, 2009); *Musticchi v. Little Rock*, No. 4:08cv00419 SWW, 2009 U.S. Dist. LEXIS 120549, at *15 (E.D. Ark. Feb. 2, 2009); *Gil v. Solectron Corp.*, No. C-07-06414 RMW, 2009 U.S. Dist. LEXIS 3413, at *8-*13 (N.D. Cal. Jan. 9, 2009); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 962 (W.D. Wis. 2008); *Musch v. Domtar Industries, Inc.*, 252 F.R.D. 456, 463 (W.D. Wis. 2008); *Robinson v. Tyson Foods, Inc.*, 254 F.R.D. 97, 102 (S.D. Iowa 2008); *Spoerle v. Kraft Foods Global, Inc.*, 253 F.R.D. 434, 443 (W.D. Wis. 2008); *DeKeyser v. Thyssenkrupp Waupaca Foundry, Inc.*, No. 08-C-488, 2008 U.S. Dist. LEXIS 102318, at *14 (E.D. Wis. Dec. 18, 2008); *Cortez v. Nebraska Beef, Inc.*, No. 8:08CV90, 2008 U.S. Dist. LEXIS 95562, at *5 (D. Neb. Nov. 21, 2008); *Martinez-Hernandez v. Butterball, LLC*, No. 5:07-174-H(2), 2008 U.S. Dist. LEXIS 111931, at *15 (E.D.N.C. Nov. 14, 2008); *Daniel v. Quail Int'l, Inc.*, No. 3:07-CV-053 (CDL), 2008 U.S. Dist. LEXIS 61013, at *9 (M.D. Ga. Aug. 11, 2008); *Lopez v. Tyson Foods*, No. 8:06CV459, 2008 U.S. Dist. LEXIS 60050, at *10 (D. Neb. Aug. 7, 2008); *Owens v. Southern*

Notably, many of these decisions certified class actions and/or collective actions for employees at multiple facilities across the country. *See, e.g., In re*

Hens, Inc., No. 2:07cv28-KS-MTP, 2008 U.S. Dist. LEXIS 34817, at *13-*14 (S.D. Miss. Mar. 17, 2008); *In re Pilgrim's Pride F.L.S.A. Litigation*, MDL Docket No. 1:07-cv-1832, 2008 U.S. Dist. LEXIS 93966, at *10-*12 (W.D. Ark. Mar. 13, 2008); *Lugo v. Farmer's Pride Inc.*, No. 07-cv-00749, 2008 U.S. Dist. LEXIS 17565, at *10-*11 (E.D. Pa. Mar. 7, 2008); *Lopez v. Sam Kane Beef Processors, Inc.*, No. CC-07-335, 2008 U.S. Dist. LEXIS 15572, at *6 (S.D. Tex. Feb. 29, 2008); *Centurioni v. City & County of San Francisco*, No. C 07-01016 JSW, 2008 U.S. Dist. LEXIS 10856, at *11 (N.D. Cal. Feb. 1, 2008); *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1014-15 (D. Minn. 2007); *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2007 U.S. Dist. LEXIS 95439, at *3, *31 (N.D. Cal. Dec. 19, 2007); *Conerly v. Marshall Durbin Co.*, No. 2:06cv205KS-MTP, 2007 U.S. Dist. LEXIS 85994, at *32 (S.D. Miss. Nov. 6, 2007); *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007 U.S. Dist. LEXIS 71179, at *39 (D. Minn. Sept. 24, 2007); *Olson v. Tesoro Refining & Marketing Co.*, No. C06-1311RSL, 2007 U.S. Dist. LEXIS 67747, at *25-*26 (W.D. Wash. Sept. 12, 2007); *Mims v. Carrier Corp.*, No. 2:06-CV-206, 2007 U.S. Dist. LEXIS 102270, at *11 (E.D. Tex. Sept. 11, 2007); *Dominquez v. Minn. Beef Industries, Inc.*, No. 06-1002 (RHK/AJB), 2007 U.S. Dist. LEXIS 61298, at *9 (D. Minn. Aug. 21, 2007); *Benbow v. Gold Kist, Inc.*, No. 3:06-cv-02751-MBS, 2007 U.S. Dist. LEXIS 102273, at *6-*7 (D.S.C. Apr. 16, 2007); *King v. Koch Foods of Miss.*, No. 3:06CV301TSL-JCS, 2007 U.S. Dist. LEXIS 26746, at *3-*11 (S.D. Miss. Apr. 10, 2007); *Dege v. Hutchinson Technology, Inc.*, No. 06-3754 (DWF/RLE), 2007 U.S. Dist. LEXIS 12471, at *6 (D. Minn. Feb. 22, 2007); *Aguilar v. Pilgrim's Pride Corp.*, No. CV-06-J-1673-NE, 2007 U.S. Dist. LEXIS 29168, at *12-*13 (N.D. Ala. Jan. 31, 2007); *Allen v. McWane, Inc.*, No. 2:06-CV-158 (TJW), 2006 U.S. Dist. LEXIS 81543, at *17 (E.D. Tex. Nov. 7, 2006); *Vogt v. Texas Instruments, Inc.*, No. 3:05-CV-2244-L, 2006 U.S. Dist. LEXIS 67226, at *13 (N.D. Tex. Sept. 19, 2006); *Albritton v. Cagles, Inc.*, No. 1:05-CV-74 (WLS), 2006 U.S. Dist. LEXIS 65027, at *5 (N.D. Ga. Sept. 11, 2006); *Carlson v. Leprino Foods Co.*, No. 1:05-CV-798, 2006 U.S. Dist. LEXIS 48589, at *17 (W.D. Mich. June 30, 2006).

Tyson Foods, Inc., Fair Labor Standards Act Litigation, 694 F. Supp. 2d at 1380 (holding that previously certified collective actions should remain certified with respect to eight (8) of defendant's chicken processing plants in six (6) states); *Gil*, 2009 U.S. Dist. LEXIS 3413, at *8-*13 (granting motion to conditionally certify collective action that included employees at seventeen (17) of defendant's facilities located across the nation); *In re Pilgrim's Pride Fair Labor Standards Act Litigation*, 2008 U.S. Dist. LEXIS 93966, at *10-*12 (granting consolidated motion to certify collective action that included current and former employees from twenty-one (21) different chicken processing plants spread across ten (10) states); *Benbow*, 2007 U.S. Dist. LEXIS 102273, at *6-*7 (granting motion for collective action certification for collective action involving all of defendant's chicken processing plants in Alabama, Georgia, South Carolina, North Carolina, and Florida).

Significantly, no appellate court reviewed the decision to certify a class action and/or a collective action in any of the above cases. Indeed, this Court has never specifically addressed the procedures and standard to be applied in determining whether an FLSA § 216(b) case should proceed as a collective action. Defendants typically must wait until a final judgment is entered in the case to appeal a class or collective action certification order. While 28 U.S.C. § 1292 provides that district courts can allow interlocutory appeals by certifying the issue to court of appeals in certain limited circumstances, the court of appeals then has discretion to allow the appeal. *See Swint v. Chambers Cnty Comm'm*, 514 U.S. 35, 47 (1995). Given these hurdles, "appellate review

of class certification decisions under § 1292(b) is and will be rare." *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998).

As a practical matter, the decision to certify a class or a collective action by a district court, even conditionally, places a great deal of economic pressure on employers, and thus often results in employers paying substantial sums to settle the case at that point. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) (explaining that plaintiff's counsel "must think that like most class action suits this one would not be tried—that if we ordered a class or classes certified, DirectSat would settle."); William C. Martucci & Jennifer K. Oldvader, *Addressing the Wave of Dual-Filed Federal FLSA and State Law "Off-The-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform*, 19 Kan. J.L. & Pub. Pol'y 433, 451 (2010) (explaining that discovery costs for employers following conditional certification of a collective action, which "may be granted if the plaintiff does as little as make 'substantial allegations' showing possible FLSA violations can result in enormous pressure on defendants to settle"). Further illustrating this point, for the 12-month period ending March 31, 2014, only 1.4 percent of the thousands of FLSA cases filed reached trial. *See* Administrative Office of the United

States Courts, *Judicial Business of the United States Courts: 2014 Report of the Director*, Table C-4.[9]

Settlements of class wage and hour claims are often quite lucrative for plaintiffs' counsel, which incentivizes the plaintiffs' bar to bring these "professionally assembled class action[s]" and to assemble them to be as large as possible. Pet. App. at 115a (Beam, J., dissenting from rehr'g denial). The value of *only* the top ten private wage-and-hour class action settlements has been over $200 million every year from 2009 to 2014. *See Annual Workplace Class Action Litigation Report*, Seyfarth Shaw LLP, at 4 (2015 ed.). A significant portion of these settlement sums go to plaintiffs' counsel. *See, e.g., Morales v. Farmland Foods, Inc.*, No. 8:08CV504, 2013 U.S. Dist. LEXIS 56501, at *3, *38 (D. Neb. Apr. 18, 2013) (awarding plaintiffs' counsel over $2 million in fees despite the fact that the class only received $275,000 as part of the settlement); *In re Bank of Am. Wage & Hour Litig.*, No. 10-MD-2138-JWL, 2013 U.S. Dist. LEXIS 180056, at *21-*23 (D. Kan. Dec. 18, 2013) (approving $73 million settlement of FLSA and state law wage and hour class claims with $18.25 million of the settlement fund going to plaintiffs' counsel); *see also Garcia v. Tyson Foods, Inc.*, No. 06-2198-JTM, 2012 U.S. Dist. LEXIS 170177, at *25, *46 (D. Kan. Nov. 29, 2012) (awarding over $3.2 million in attorneys' fees on a judgment of $533,011 in a wage and hour class action).

Based on the above, it is evident that (1) wage and hour collective and class action litigation has exploded in recent years, (2) many of these cases involve

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[9] Available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx.

donning and doffing claims that are similar to the claims at issue here, (3) in the majority of cases, class or collective action certification is granted by district courts, and (4) these decisions granting certification are very rarely reviewed by federal appellate courts because certification places a great deal of pressure on employers to settle.

II. DISTRICT COURTS FREQUENTLY ADDRESS WHETHER DATA AND TESTIMONY FROM A SAMPLE OF EMPLOYEES CAN BE EXTRAPOLATED TO DETERMINE LIABILITY AND DAMAGES IN WAGE AND HOUR CLASS CASES.

As discussed in detail in Tyson's Petition, multiple circuit courts of appeals have confronted the issue of whether a class can be certified where liability and/or damages will be determined using information from a sample number of employees and have reached different and conflicting conclusions. *Compare Espenscheid*, 705 F.3d at 774-77 (rejecting plaintiffs' proposal "to get around the problem of variance" among class members regarding overtime pay due by using representative testimony at trial and thus affirming district court's ruling that decertified class), *with In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1257 (10th Cir. 2014) (affirming district court's grant of class certification where plaintiffs "proved" damages using an expert who applied average overcharges to disparate transactions).

In recent years, federal district courts have regularly dealt with these issues in wage and hour cases and likewise reach differing conclusions. *See, e.g., Johnson v. Wave Comm GR LLC*, 4 F. Supp. 3d 453, 461 (N.D.N.Y. 2014) (denying defendant's motion

to decertify class and explaining that plaintiffs "have established that the representative testimony they intend to introduce satisfied their burden of establishing a prima facie violation of the FLSA"); *Wilson v. Navika Capital Group, LLC*, No. 4:10-CV-1569, 2014 U.S. Dist. LEXIS 7181, at *53, *55 (S.D. Tex. Jan. 17, 2014) (deferring its ruling on defendant's motion for decertification, expressing "serious concerns with the fairness of using representative testimony on the issue of non-compensable pre- or post-liminary activities" and expressing "serious doubts that any form of 'representative' proof could fairly determine which employees were actually denied overtime compensation, let alone how much"); *Thompson v. Bruister & Assoc.*, No. 3:07-00412, 2013 U.S. Dist. LEXIS 139374, at *16-*20 (M.D. Tenn. Sept. 27, 2013) (granting defendant's motion to certify class decertification issue to the Court of Appeals for the Sixth Circuit where defendant argued that it would be improper to prove liability and damages for class using representative testimony);[10] *Farmer v. DirectSat USA, LLC*, No. 08 CV 3962, 2013 U.S. Dist. LEXIS 79825, at *20-*21 (N.D. Ill. June 6, 2013) (granting defendant's motion for decertification, rejecting plaintiffs' reliance on representative proof and explaining that "even if Plaintiffs could establish an 'average' number of overtime hours through representative proof, some technicians would receive a windfall while others would be undercompensated"); *Howard v. Securitas Sec. Servs. USA, Inc.*, No. 08 C 2746, 09 C

[10] The Sixth Circuit refused to consider the class certification decision on an interlocutory appeal, which further illustrates USPOULTRY's earlier point that appellate review of class certification decisions is extremely rare. *See Thompson*, No. 3:07-00412, at Docket Entry No. 941.

3633, 2013 U.S. Dist. LEXIS 44912, at *9-*10 (N.D. Ill. Mar. 28, 2013).

As another example, in *Lugo v. Farmer's Pride Inc.*, 737 F. Supp. 2d 291, 303 (E.D. Pa. 2010), the district court rejected plaintiffs' counsel's notion that he could prove class-wide liability through a time study by Dr. Mericle, much like the one he conducted in the present case, and decertified the class:

> The evidence indicates that there may be some hourly production workers who have legitimate claims of undercompensation for time spent donning and doffing, and some who may not; the evidence does not demonstrate, however, that the question of undercompensation can be answered in a manner common to all plaintiffs. If the present case were tried collectively and a verdict were reached for defendant, this result would be unfair to those plaintiffs who may have been denied pay owed them for donning and doffing; similarly, if a verdict were reached for plaintiffs, this would be unfair to defendant, who would be deemed liable as to the entire collective-action class when it may not have undercompensated all individual members of that class.

In *Childress v. Ozark Delivery of Missouri, LLC*, No. 6:09-cv-03133-MDH, 2014 U.S. Dist. LEXIS 173309 (W.D. Mo. Dec. 16, 2014), the district court considered a motion to exclude the expert testimony of Dr. Liesl Fox regarding issues of liability and damages with respect to FLSA claims asserted by a class of drivers alleging they were not compensated for all hours worked in violation of the FLSA, and the district court reached a conclusion that is inconsistent

with the district court's conclusion in *Lugo*. Dr. Fox is the same expert who was employed by class counsel in the present case to calculate claimed damages. In *Childress*, as in the present case, Dr. Fox relied on information from a select number of class members to calculate damages for the entire class. *Id.* at *6. Ozark argued that Dr. Fox's report and testimony should be excluded because it was improper to determine class-wide damages based on information regarding only *some* class members. *Id.* at *4. The court acknowledged that, in making her assessment, Dr. Fox assigned to class members "a fictitious number of overtime hours based upon the average number of overtime hours worked" by a sample set of employees. *Id.* at *11. However, the court ruled that Dr. Fox's testimony would be admissible. *Id.* at *25. In doing so, the court "recognize[d] the potential windfall associated with the extrapolation of data in these types of cases," but held that this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) "allows reasonable extrapolation in cases like the one before the Court." *Id.* at *12.

Properly reading and applying this Court's decision in *Mt. Clemens, in Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611 (S.D. Cal. 2014), the district court held that a class should not be certified based on a theory that a defendant's liability to all class members can be established through expert analysis of a sample of employees. In *Stiller*, plaintiffs alleged that, while Costco's supervisors and managers performed closing activities, they were "locked in" their respective stores after clocking out at the end of closing shifts and that they were not compensated for this "locked in" time in violation of state law and the FLSA. *Id.* at 615. A Rule 23 class and an FLSA collective action were previously certified, which included all employees

"who were subject to Costco's closing lockdown procedures" during the relevant time period. *Id.* at 614-15. In support of continued certification, plaintiffs provided testimony from over 100 employees stating they were locked in stores without compensation while managers and supervisors completed closing procedures. *Id.* at 616. Based on this and other evidence, the court noted that plaintiffs had established that Costco had a de facto policy of detaining employees in warehouses during closing procedures without pay. *Id.* at 624.

However, in granting Costco's decertification motion, the court explained that plaintiffs' evidence answered only the question of whether employees were sometimes detained without pay as a result of the policy, which was not enough to proceed to trial as a class on the FLSA and state wage-law claims. *Id.* at 625. As the court explained, "if it can only be determined on a classwide basis whether the Alleged Policy *sometimes* resulted in unpaid OTC time, individualized determinations will be required to determine the question of liability." *Id.* at 625 (emphasis added). This is because class-wide liability hinges on whether all employees in the class actually performed work for which they were not compensated. *Id.* The court explained further:

> Assuming Plaintiffs prove the existence of the Alleged Policy and that the Alleged Policy sometimes resulted in unpaid detention time, there is no classwide method of determining whether, how often, and for how long class members actually experienced unpaid OTC time as a result of the Alleged Policy. As such, liability cannot be proved on a classwide basis without thwarting Costco's ability to

> demonstrate that some class members, due to a variety of circumstances, did not actually experience unpaid OTC time despite being subject to the Alleged Policy.

Id. at 628.

Plaintiffs contended that they could establish common liability at trial using the results from an expert time-and-motion study measuring the time it would take certain individuals to conduct the activities that had to take place during the time that employees were being detained without pay to come up with an estimated average time. *Id.* The court explained that this type of study was not "an acceptable form of common proof of liability." The court rejected plaintiffs' reliance on this Court's decision in *Mt. Clemens* in support of such an approach, explaining as follows:

> The Court rejects Plaintiffs' assertion that the approach used in Mt. Clemens can be used here to establish, "as a matter of just and reasonable inference," the average frequency and length of detention time that the Alleged Policy caused. Again, Plaintiffs put the damages cart before the liability horse. Mt. Clemens first requires that an employee "prove[] that he has in fact performed work for which he was improperly compensated." Accordingly, while the Mt. Clemens approach may offer a classwide basis of proving damages, proving liability in this case first requires individuals to show they performed uncompensated "work" as a result of the Alleged Policy.

Id. at 629. Thus, the court granted Costco's motion to decertify the Rule 23 class and the FLSA class. *Id.* at 633.

III. THE EIGHTH CIRCUIT MISCONSTRUED *MT. CLEMENS* AND SHOULD HAVE DECERTIFIED THE CLASS.

It is USPOULTRY's position that the court in *Stiller* correctly applied *Mt. Clemens* in decertifying the class at issue and that the court of appeals and the district court in the present case misapplied *Mt. Clemens* in reaching the opposite result. In the present case, Plaintiffs claimed that Tyson violated the FLSA and Iowa law by failing to pay class members overtime pay. More specifically, Plaintiffs claimed that class members spent time engaging in donning and doffing and related activities without being provided adequate compensation, resulting in the class members working over 40 hours and therefore into unpaid overtime. In granting Plaintiffs' motion for conditional certification of a collective action, the district court agreed with Tyson that "there [we]re some very big factual differences" among the members in the proposed class given that "the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different." Pet. App. 87a. Nevertheless, the district court certified a 3,334-member Rule 23 class and a 444-member FLSA collective action because the "gang time compensation system" was a common policy that applied to all such members. Pet. App. 87a, 110-11a; Apdx.00684.

At trial, Plaintiffs relied on average donning, doffing, and walking times formulated by Dr. Mericle based on his study of a sample number of employees to

prove class-wide liability and damages. Pet. App. 5a. Dr. Mericle calculated an "average time" based on his study, and this "average time" was then applied to all class members even though Dr. Mericle acknowledged "a lot of variation" in his observed times between employees. Apdx. 0082-0083; Tr. 1158. Following trial, Tyson appealed to the Eighth Circuit Court of Appeals, contending that the class and collective action should not have been certified because questions of liability or damages were not "capable of classwide resolution . in one stroke." Dkt. 212-1 at 5 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (U.S. 2011)). Tyson argued further that to determine its liability based on the amount of time a hypothetical "average" employee engaged in donning/doffing-related activities vitiated Tyson's right to demonstrate that *individual* class members were not entitled to overtime. Dkt. 237 at 5.

The Eighth Circuit rejected Tyson's arguments and affirmed the district court. Pet. App. 1a. The Eighth Circuit held that to apply Dr. Mericle's time study to "individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 . (1946)." *Id.* at 8a. As Tyson asserts in its petition, the Eighth Circuit has distorted this Court's holding in *Mt. Clemens*.

In *Mt. Clemens*, this Court explained that "[a]n employee who brings suit under § 16(b) of the [FLSA] for unpaid overtime compensation has the burden of proving that *he* performed work for which *he* was not properly compensated." 328 U.S. at 686-87 (emphasis added). This Court explained that once an employee meets his or her burden of establishing liability, the employee, in certain situations, can

establish the extent of his damages by "produc[ing] sufficient evidence to show the amount and extent of that [uncompensated] work as a matter of just and reasonable inference." *Id.* at 687. This Court was quite careful to explain that this diminished burden of proving damages as a matter of just and reasonable inference was appropriate only *because* the FLSA violation had already been established with respect to each employee:

> [S]uch a result [is not] to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damages is itself uncertain. But *here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute.* The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer.

Id. at 688 (emphasis added); *see also O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567, 602-03 (6th Cir. 2009) ("*Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are.").

In the present case, Plaintiffs were contending that each class member was denied proper overtime compensation in violation of the FLSA, which meant that, to prove liability, Plaintiffs had the burden to prove overtime work was performed without proper compensation by each class member. *See Mt. Clemens*, 328 U.S. at 686-87. Only after making such a showing

with respect to a particular class member could damages be established by just and reasonable inference with respect to the class member. *Id.* at 688. The Eighth Circuit, however, misapplied *Mt. Clemens* and incorrectly held that liability with respect to all class members could be established by just and reasonable inference through Dr. Mericle's study of a sample of employees and his resulting calculation of an "average time" that he applied to all class members. In doing so, the Eighth Circuit "put the damages cart before the liability horse" and sanctioned a class-wide verdict for a class that included at least 212 members to whom Tyson had no liability. *Stiller*, 298 F.R.D. at 629.

As discussed above, other courts have similarly misconstrued *Mt. Clemens* and other precedent from this Court and have certified wage and hour classes on the theory that liability to a class can properly be proved by extrapolating data from a sample number of employees. Currently, the procedural devices of class notice under § 216(b) and class certification under Rule 23 are being employed to overwhelm a defendant's ability to defend against claims on the merits. Without meaningful standards, defendants will continue to be denied the opportunity to defend against similar claims on the merits in the future. Given the frequency with which these issues arise and the conflicting rulings by lower courts, it is critical to USPOULTRY's members that this Court grant Tyson's petition and resolve the issues raised.

CONCLUSION

For the foregoing reasons, USPOULTRY requests that Tyson's petition for writ of certiorari be granted.

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